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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

GOLDEN EAGLE INSURANCE COMPANY,

Plaintiff and Appellant,

v.

CENTURY SURETY COMPANY,

Defendant and Respondent.

E031966

(Super.Ct.No. SCV 66098)

OPINION

APPEAL from the Superior Court of San Bernardino County. John P. Wade, Judge. Reversed and remanded.

Law Offices of Glenn M. White and Glenn M. White for Plaintiff and Appellant.

O'Hara Barnes, Callie C. O'Hara, Randel L. Ledesma and David Hyek for Defendant and Respondent.

FACTUAL AND PROCEDURAL BACKGROUND

In an action entitled *Raul and Tammy Americano et al. v. Citation Homes, Inc*., *et al*. (Super. Ct. San Bernardino County, No. SCV 41268) and filed in September of 1997, various homeowners sued the builder of the housing development in which they lived,

alleging a variety of construction defects, including defective roofs. Subsequently, the defendants cross-complained against Premier Roofing and Building Company, Inc. Premier was a roofer that, pursuant to subcontracts issued in 1992 and 1993, had installed tile roofing on some of the homes at issue in the *Americano* action.

Premier was insured at different times by two insurers: Golden Eagle Insurance Company and Century Surety Company. Golden Eagle issued to Premier two policies of commercial general liability insurance, which collectively were effective from October 1991 to October 1993. Century issued to Premier three commercial general liability insurance policies: policies CCP 146859, 158506, and 166581, which collectively were effective from June 1998 through June 2000. Golden Eagle's policies provide that, if there is "other insurance," then liability will generally be prorated between all the insurers. By contrast, Century's policies provide that, when there is "other insurance," Century's policies shall be excess coverage only.

Golden Eagle defended and indemnified Premier in the *Americano* action under a reservation of rights. In April of 1999, Golden Eagle tendered the defense to Century as well. In its tender letter, Golden Eagle advised Century that it had accepted Premier's tender of defense under a reservation of rights, but Century refused to defend, contending that under its "other insurance" clause, its policies were excess to those of Golden Eagle.

To settle the *Americano* action, Premier paid $100,000, of which Golden Eagle paid $80,000. Golden Eagle also paid over $30,000 in costs and attorney's fees incurred

in the defense of that action. Century paid nothing toward either indemnification or defense.

Golden Eagle sued Century for declaratory relief and equitable contribution. In February of 2002, Golden Eagle moved for summary judgment or summary adjudication, contending that, as a matter of undisputed fact, Century was required to share pro rata in the cost of indemnifying and defending Premier. Two weeks later, Century filed its own motion for summary judgment, in which it argued that, as a matter of undisputed fact, it was not required to contribute to the cost of indemnifying or defending Premier because its policies were excess.

The trial court granted Century's motion and denied Golden Eagle's motion in its entirety. A judgment in favor of Century was entered accordingly. Golden Eagle appeals.

CONTENTIONS

To demonstrate that the trial court erred by granting summary judgment, Golden Eagle argues (1) that Century did not establish that other insurance covered the losses at issue in the underlying action; (2) there was sufficient evidence to trigger Century's duty to defend; and (3) because Century failed to defend, it must share in the burden of indemnification. In other words, Golden Eagle contends the trial court should have denied Century's summary judgment motion and granted Golden Eagle's.

ANALYSIS

A. THE TRIAL COURT ERRED BY GRANTING SUMMARY JUDGMENT

Golden Eagle contends, as it did in the trial court, that the "other insurance" clauses in Century's policies do not apply at all and even if applicable, Century nevertheless is liable for a pro rata share of the costs of indemnification and defense. We agree that the trial court should not have granted summary judgment.

"'There are two levels of [liability] insurance coverage—primary and excess. Primary insurance is coverage under which liability "attach[es] to the loss immediately upon the happening of the occurrence." [Citation.] Liability under an excess policy attaches only after all primary coverage has been exhausted. [Citation.]'" (*Community Redevelopment Agency v. Aetna Casualty & Surety Co*. (1996) 50 Cal.App.4th 329, 337-338, quoting from *North Rivers Ins. Co*. *v. American Home Assurance Co*. (1989) 210 Cal.App.3d 108, 112.)

Here, both Golden Eagle's and Century's policies[1] provide primary coverage. Most primary liability policies contain "other insurance" clauses. (*Pacific Indemnity Co. v. Bellefonte Ins. Co*. (2000) 80 Cal.App.4th 1226, 1234.) Those clauses are designed to "'limit an insurer's liability to the extent that other insurance may cover the same loss.'" (*Dart Industries, Inc. v. Commercial Union Ins. Co*. (2002) 28 Cal.4th 1059, 1078, fn. 6,

quoting Croskey et al., Cal. Practice Guide: Insurance Litigation (The Rutter Group 1998) ¶ 8-2, p. 8-1.) As noted above, the policies at issue here are no exception. Century's policies include "other insurance" clauses that purport to convert its coverage from primary to excess in the event that some other policy provides primary coverage and that further purport to eliminate the duty to defend when the policy is converted to excess coverage. By contrast, Golden Eagle's policies provide that, in the event of "other insurance," Golden Eagle shall cover the loss pro rata with the other insurance.[2]

"Other insurance" clauses do not come into play unless two or more policies cover the same damage or loss suffered by the insured. (*Commerce & Industry Ins. Co. v. Chubb Custom Ins. Co*. (1999) 75 Cal.App.4th 739, 745; *Fireman's Fund Ins. Co. v. Maryland Casualty Co*. (1998) 65 Cal.App.4th 1279, 1304.) That principle is reflected in the language of Century's "other insurance" clauses, which condition the conversion of Century's coverage from primary to excess upon the existence of other "valid and collectible insurance . . . for a loss we cover . . . ." In other words, an "other insurance" clause is not triggered until there is a determination that other insurance actually covers the loss.

[footnote continued from previous page]

[1] Century asserted in its motion for summary judgment that only one of its policies, CCP 146859 effective June 25, 1997 to June 25, 1998, had any application to the underlying claim.

[2] In addition to the "pro rata" and "excess-only" clauses at issue here, another common type of "other insurance" clause provides that the insurer provides neither primary nor excess coverage for any loss that is covered by other insurance. This is

[footnote continued on next page]

Century did not establish in its motion for summary judgment that Golden Eagle's policies provided coverage for the losses at issue in this case. Instead, Century took the position that all damage was continuous and progressive and, under the authority of *Montrose Chemical Corp. v. Admiral Ins. Co.* (1995) 10 Cal.4th 645, was potentially covered by all policies in effect during the periods when damage occurred. (*Id*. at p. 689.) If the damages in fact were continuous and progressive then both Golden Eagle and Century arguably would have provided primary coverage for the same losses. Century did not establish the critical fact, namely, that Golden Eagle's policies actually provided coverage for the losses in question.

To support its position that the damages were continuous and progressive, and therefore arguably covered by Century's policies and Golden Eagle's policies, Century cited paragraphs 13 and 22 of the complaint in the underlying action which alleged that at the time of purchase by the plaintiffs, the property was defective in numerous respects, including faulty roof design and construction and therefore not fit for its intended use. Century also cited paragraph 15 of Golden Eagle's complaint which alleged, "The underlying action alleged that continuous, progressive property damage occurred during, but not limited to, the periods of Century Surety's and Golden Eagle's policies." The cited allegations do not establish the critical fact, namely, that the damages were

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known as an "escape" clause. (*Olympic Ins. Co. v. Employers Surplus Lines Ins. Co*. (1981) 126 Cal.App.3d 593, 598.)

continuous and progressive and occurred during the periods covered by the Golden Eagle policies.

The allegations contained in the underlying *Americano* complaint do not constitute judicial admissions by Golden Eagle and therefore the facts alleged in that complaint are not binding on Golden Eagle, which was not a party to that action. (See *Uram v. Abex Corp*. (1990) 217 Cal.App.3d 1425, 1433 [allegation in complaint]; *Smith v. Walter E. Heller & Co*. (1978) 82 Cal.App.3d 259, 268-269 [same]; see *Mangini v. Aerojet-General Corp*. (1996) 12 Cal.4th 1087, 1097-1098 [factual assertion in appellate brief]; and see generally, 1 Witkin, Cal. Evidence (4th ed. 2000) Hearsay, § 97, p. 799; 4 Witkin, Cal. Procedure (4th ed. 1997) Pleading, §§ 415-416, pp. 512-513.)

Although the factual allegations in Golden Eagle's complaint against Century are judicial admissions and therefore binding on Golden Eagle, what Golden Eagle alleged in its pleading was that the complaint in the underlying action had alleged that the damages were continuous and progressive. That allegation is not a judicial admission of the dispositive fact, which is that the damages actually were continuous and progressive, but instead is an admission of what the underlying complaint alleged. The noted allegations are the only factual support Century offered to support its assertion that the losses were continuous and progressive and therefore covered by Golden Eagle's policies. Because the allegations do not establish the dispositive fact, Century failed to establish that other insurance covered all of the losses in question. In the absence of other insurance that covers the losses, the "other insurance" clauses in Century's policies were not triggered

and Century's coverage remained primary. Therefore, the trial court erred in granting Century's motion for summary judgment.

But even if Century had established the dispositive fact, we nevertheless would conclude the trial court erred in granting its motion for summary judgment. For reasons we now explain, we would construe Century's other insurance clause as requiring it to share in the duty to defend and indemnify pro rata.

When there is a conflict between a policy with an excess-only "other insurance" clause and one with a pro rata "other insurance" clause, both insurers will share in the duties to defend and indemnify pro rata. (*Century Surety Co. v. United Pacific Ins. Co.* (2003) 109 Cal.App.4th 1246, 1256-1260; *Pacific Indemnity Co. v. Bellefonte Ins. Co*., *supra*, 80 Cal.App.4th at p. 1237; *Commerce & Industry Ins. Co. v. Chubb Custom Ins. Co*. (1999) 75 Cal.App.4th 739, 749; *American Continental Ins. Co. v. American Casualty Co*. (1999) 73 Cal.App.4th 508, 515; *Fireman's Fund Ins. Co. v. Maryland Casualty Co*. (1998) 65 Cal.App.4th 1279, 1305-1306; *CSE Ins. Group v. Northbrook Property & Casualty Co*. (1994) 23 Cal.App.4th 1839, 1845.)

Century acknowledges the existence of these authorities but argues that they are contrary to binding precedent. In particular, Century notes that in 1966 our Supreme Court considered the conflict between an excess-only "other insurance" clause and a pro rata "other insurance" clause and concluded, as a "general rule," that courts should enforce "excess insurance provisions contained in policies, even in situations where to do

so will be inconsistent with proration provisions in the other policies." (*Pacific Employers Ins. Co. v. Maryland Casualty Co*. (1966) 65 Cal.2d 318, 328.)

But Century overlooks the fact that the Supreme Court has recently and expressly endorsed the very line of authority that Century would have us reject: "'[O]ther insurance' clauses that attempt to shift the burden away from one primary insurer wholly or largely to other insurers have been the objects of judicial distrust. '[P]ublic policy disfavors "escape" clauses, whereby coverage purports to evaporate in the presence of other insurance. [Citations.] This disfavor should also apply, to a lesser extent, to excess-only clauses, by which carriers seek exculpation whenever the loss falls within another carrier's policy limit.' [Citing, inter alia, *CSE Ins. Group v. Northbrook Property & Casualty Co*., *supra*, 23 Cal.App.4th at p. 1845.] Partly for this reason, the modern trend is to require equitable contributions on a pro rata basis from all primary insurers regardless of the type of 'other insurance' clause in their policies." (*Dart Industries, Inc. v. Commercial Union Ins. Co*., *supra*, 28 Cal.4th at pp. 1079-1080, citing with approval *CSE Ins. Group* at p. 1845, *Pacific Indemnity Co. v. Bellefonte Ins. Co*., *supra*, 80 Cal.App.4th at pp. 1236-1238, and *Fireman's Fund Ins. Co. v. Maryland Casualty Co*., *supra*, 65 Cal.App.4th at pp. 1305-1306.) Accordingly, the Supreme Court has implicitly abandoned the rule upon which Century relies.[3]

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[3] We note that *Dart Industries, Inc. v. Commercial Union Ins. Co*. was decided in August of 2002. Inexplicably, neither party brought this dispositive authority to our attention in their respective briefs, even though those briefs were filed four to 10 months after *Dart* was decided.

In short, contrary to Century's assertion in its motion for summary judgment, its excess only "other insurance" clauses did not relieve it of the burden of defending and indemnifying Premier. Because that was the sole basis for its motion, the summary judgment must be reversed.

B. THE TRIAL COURT ERRED IN DENYING GOLDEN EAGLE'S MOTION FOR SUMMARY ADJUDICATION ON THE ISSUE OF CENTURY'S DUTY TO DEFEND

Golden Eagle contends in this appeal as it did in its motion for summary adjudication of issues that when it tendered the defense of the *Americano* action to Century, Century did not know as a matter of undisputed fact that Golden Eagle's policies provided "valid and collectible insurance" to Premier for the same losses covered by Century's policies. Because the existence of "other insurance" had not been established, the other insurance clauses were not triggered and Century's policies remained primary. As long as those policies remained primary, there was a potential for coverage and Century had a duty to defend Premier. Again, Golden Eagle is correct.

In its letter tendering the defense of the *Americano* action, Golden Eagle informed Century that it had assumed the defense of Premier under a reservation of rights. Golden Eagle's tender letter also advised that "the damages [in the underlying action] are alleged to be continuous and progressively deteriorating in nature. Therefore, we believe that each of your companies has a duty to participate in the defense of the insured along with Golden Eagle."

Because Golden Eagle had reserved its right to deny coverage and because Century did not establish as an undisputed fact that the losses were covered under the Golden Eagle policies, there was a doubt at the time of the tender to Century whether there was "other insurance" in addition to Century's policy. While that uncertainty existed, there was a potential for coverage by Century. That potential coverage gave rise to Century's duty to defend, as Golden Eagle also asserted in its motion for summary judgment and summary adjudication of issues.

"Liability insurance usually imposes two separate obligations on the insurer: (1) *to indemnify* its insured against third party claims covered by the policy (by settling the claim or paying any judgment against the insured); and (2) *to defend* such claims against its insured (by furnishing competent counsel and paying attorney fees and costs)." (2 Croskey et al., Cal. Practice Guide: Insurance Litigation (The Rutter Group 1998) ¶ 7:500, p. 7B-1.)

The two duties are not coextensive. An insurer's duty to indemnify extends only to those claims that are, in light of the proven facts, actually covered by the terms of the policy. (*Buss v. Superior Court* (1997) 16 Cal.4th 35, 46.) It arises only after the insured's liability to the third-party claimant is established. (*Ibid*.)

But an insurer's duty to defend is broader than its duty to indemnify. (*Buss v. Superior Court, supra,* 16 Cal.4th at p. 46; *Montrose Chemical Corp. v. Superior Court* (1993) 6 Cal.4th 287, 295.) The insurer must provide a defense, not only for those claims that are either conceded to be or adjudicated to be within the scope of its duty to

indemnify, but also for any """suit which *potentially* seeks damages within the coverage of the policy."""" (*Ibid*., quoting *Gray v. Zurich Insurance Co*. (1966) 65 Cal.2d 263, 275.) "Any doubt as to whether the facts establish the existence of the defense duty must be resolved in the insured's favor." (*Montrose Chemical Corp. v. Superior Court*, *supra*, 6 Cal.4th at pp. 299-300.) That duty can arise as soon as the insured tenders defense of a potentially covered claim to the insurer. (*Buss v. Superior Court, supra,* 16 Cal.4th at p. 46.)

Whether a potential for coverage of a particular claim exists, and thus whether the resulting duty to defend that claim has arisen, are determined by comparing the terms of the policy (1) to the allegations of the complaint and (2) to facts or factual assertions that are extrinsic to the complaint but known to the insurer (*Montrose Chemical Corp*. *v. Superior Court, supra,* 6 Cal.4th at pp. 295-296), even if those factual assertions are disputed by the insurer. (*Id*. at p. 300.) To prevail on the issue of whether a duty to defend exists, "the insured must prove the existence of a *potential for coverage*, while the insurer must establish *the absence of any such potential*. In other words, the insured need only show that the underlying claim *may* fall within policy coverage; the insurer must prove it *cannot*." (*Ibid*.)

The existence of a duty to defend is not a static issue. The potential for coverage that gives rise to the duty at the time the underlying action is tendered may, following the acquisition of additional evidence bearing on the issue, be shown to have evaporated. (See *Montrose Chemical Corp*. *v. Superior Court, supra,* 6 Cal.4th at p. 301.) However,

a judicial determination that the potential for coverage *no longer* exists does not mean that the duty to defend *never* existed. Rather than retroactively relieve the insurer of the duty to defend, that determination merely relieves the insurer of the obligation to *continue* to defend. (*Buss v. Superior Court, supra*, 16 Cal.4th at p. 46; *Hartford Accident & Indemnity Co. v. Superior Court* (1994) 23 Cal.App.4th 1774, 1781.) To establish that a duty to defend never arose at all, an insurer must establish that, under the undisputed facts known to it *at the time the defense of the third party suit was tendered to it*, there was no potential for coverage.

Century took the position that because there was potential coverage under the Golden Eagle policies as a result of which Golden Eagle had a duty to defend, Century did not have a duty to defend. Century's position is based on an incorrect interpretation of the language of its policies. Century's policies provide that when other insurance covers a loss covered under the Century policies, Century's insurance becomes excess coverage and Century has no duty to defend a claim that any other insurer has a duty to defend. Century would have us interpret the quoted language as if it addressed two separate topics, one being excess coverage and the other being the duty to defend. Under Century's interpretation, it has no duty to defend if any other insurer has a duty to defend, i.e., another insurer has a potential for coverage. Century's interpretation would relieve it of the duty to defend in all cases except those in which it is clear that Century is the only insurer that provides coverage. That result runs counter not only to the previously quoted legal principles but also to the express language of Century's policies.

The provision regarding Century's duty to defend is contained in a paragraph entitled "Other Insurance." The provision ties Century's duty to defend with the existence of other insurance which, in turn, operates to convert Century's coverage from primary to excess. According to the express terms of its policies, Century's duty to defend is dependent on the existence of other insurance covering the same loss such that Century's coverage purportedly becomes excess coverage. As discussed above in connection with Century's summary judgment motion, Century did not establish the existence of other insurance as an undisputed fact and therefore its coverage, if any, remained primary. While its potential coverage is primary, Century has a duty to defend Premier.

In short, and for the reasons explained above, the trial court erred by finding that, as a matter of undisputed fact, Century had no duty to defend Premier. Therefore, the trial court erred by failing to grant Golden Eagle's motion for summary adjudication on that issue.

C. THE TRIAL COURT CORRECTLY DENIED GOLDEN EAGLE'S SUMMARY JUDGMENT MOTION

Golden Eagle contends, as it did in its motion for summary adjudication, that because Century breached its duty to defend Premier, it is liable as a matter of law to pay its pro rata share not only of the costs of defense but also of the settlement in the underlying action. Therefore, Golden Eagle claims that the trial court erred in denying its

motion for summary judgment. Golden Eagle contends, in effect, that as a result of its refusal to defend Premier, Century has waived its right to contest coverage.

Golden Eagle bases it claim on the principle that "[a]n insurance company 'bears a duty to defend its insured whenever it ascertains facts which give rise to the potential of liability under the policy.' [Citation.] Wrongful failure to provide coverage or defend a claim is a breach of contract. [Citations.] Accordingly, if an insurer 'erroneously denies coverage and/or improperly refuses to defend the insured' in violation of its contractual duties, 'the insured is entitled to make a reasonable settlement of the claim in good faith and may then maintain an action against the insurer to recover the amount of the settlement . . . .' [Citation.]" (*Isaacson v. California Ins. Guarantee Assn.* (1988) 44 Cal.3d 775, 791.) "Further, if an insurer wrongfully fails to provide coverage or a defense, and the insured then settles the claim, the insured is given the benefit of an evidentiary presumption. In a later action against the insurer for reimbursement based on a breach of its contractual duty to defend the action, a reasonable settlement made by the insured to terminate the underlying claim against him may be used as presumptive evidence of the insured's liability on the underlying claim and the amount of such liability. [Citations.]" (*Id*. at pp. 791-792.)

Isaacson is an action for reimbursement by an insured against its insurer, or more accurately the California Insurance Guarantee Association (CIGA), the entity created by statute to assume the liabilities of insolvent insurers. As the Supreme Court noted, although CIGA does not have a contractual relationship with the insured, its statutory

duties to defend and pay claims are defined by the terms of underlying insurance policy. (*Isaacson v. California Ins. Guarantee Assn.*, *supra*, 44 Cal.3d at p. 791.) The court held in *Isaacson* that when CIGA wrongfully refuses to defend or denies coverage to an insured on a claim covered under a policy issued by an insolvent insurer, CIGA "breaches its statutory duties under the Guarantee Act." (*Id*. at p. 792.) The result in *Isaacson* stems from the contractual relationship between the insured and the insurer or its successor and the duties that arise from that relationship. Golden Eagle would have us extend *Isaacson* to apply to an action such as this for equitable contribution between insurers that have potential primary coverage liability.

The obligation of multiple insurers to contribute to a settlement is not contractual. The rights and obligations of insurers to each other are determined by general principles of equity. (*Continental Cas. Co. v. Zurich Ins. Co.* (1961) 57 Cal.2d 27, 37-38.) Those principles have been applied to spread the costs of defense when an insurer with potential coverage wrongfully denies coverage and refuses to defend. (*Ibid*.; *National American Ins. Co. v. Insurance Co. of North America* (1977) 74 Cal.App.3d 565, 577.) However, Golden Eagle does not cite authority to support its view that Century by refusing to defend has waived its right to contest coverage and therefore is liable for its pro rata share of the settlement. *Golden Eagle Ins. Co v. Foremost Ins. Co.* (1993) 20 Cal.App.4th 1372, which Golden Eagle relies on, holds that an insurer that provides coverage for the loss may not contest the amount of a good faith settlement by another insurer by demanding proof of damages actually attributable to the period the insurer's policy was

in effect. Requiring such proof "would defeat a major purpose of the settlement, to *avoid* a lengthy and costly trial of a complex action involving 160 plaintiffs. [Citation.]" (*Id*. at p. 1390.) Instead, the insurers must share the costs of settlement pro rata. (*Ibid*.) The case does not hold that an insurer who wrongfully refuses to defend waives its right to contest coverage in an action for equitable contribution among insurers.

Because an insurer's duty to defend is separate from and broader than the duty to indemnify, it is equitable to require that the costs of defense be shared pro rata when an insurer wrongfully refuses to defend. However, we decline to extend the obligation by engrafting a principle derived from the contractual relationship between an insured and an insurer on to the equitable relationship between insurers. Accordingly, we conclude the trial court correctly denied Golden Eagle's motion for summary adjudication of Century's duty to indemnify it for the costs of settlement because a triable issue exists regarding whether Century's policies cover the loss.

DISPOSITION

The judgment is reversed and the case remanded to the trial court with directions to grant Golden Eagle's motion for summary adjudication on the issue of Century's duty to defend Premier and to contribute pro rata to the costs of defense.

Golden Eagle shall recover its costs on appeal.

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/s/ McKinster
Acting P. J.

We concur:

/s/ Richli
J.

/s/ King
J.